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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-510

UNITED STATES OF AMERICA,
Respondent,

vs.

WYANDOTTE COUNTY, KANSAS, et al.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners pray for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit, revising the order of the trial court dismissing a complaint filed by the United States of America under 42 U.S.C. 2000 b, Title III of the Civil Rights Act of 1964.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals of the 10th Circuit is not yet reported but is appended to this petition. (App. A)

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1973. (App. B) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the 14th Amendment to the Constitution and Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000 b, require automatic integration of Wyandotte County Jail facilities without regard to the desires of prisoners to be separated for their own safety and the well-founded fears of possible violence on the part of county officials charged with operation of jail facilities.

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

Section 1, 14th Amendment to the Constitution of the United States: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000 b:

(a) Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being

denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 2000 c of this title, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

STATEMENT OF THE CASE

This action was instituted by the Attorney General of the United States on June 5, 1972, for the purpose of securing injunctive relief against practices allegedly followed in the Wyandotte County Jail, Kansas City, Kan-

sas, which practices were alleged to be in violation of certain contractual rights of the United States, and in violation of Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000 b (a) and the Fourteenth Amendment. The United States sought an order which would require the Wyandotte County officials to "consult with" the Federal Bureau of Prisons and to develop a plan which would assure all assignments on a non-racial basis, and which would require institution of certain protective and rehabilitative programs within the county jail.

The Appellees contended that there was no discrimination on the basis of race in the jail but rather that the prisoner housing assignments were based solely on the consideration of the safety and security of the inmates and jail personnel; and that the law does not require the institution of the various rehabilitative programs suggested by the United States.

An evidentiary hearing was conducted before the United States District Court for the District of Kansas on November 1-3, 1971, in Kansas City, Kansas. This District Court on May 9, 1972, dismissed the complaint and denied all relief requested by the United States. The United States appealed on July 7, 1972.

The Wyandotte County Jail is located on the fourth floor of the Wyandotte County Court House, Kansas City, Kansas. The jail facility is over 40 years old and has a prisoner capacity of 148 inmates, with an average inmate population of 87. (R.A. 300)[1] The population in the jail is made up largely of persons not yet convicted of any crime, but detained while awaiting trial. (*Id.*) The bal-

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1. References made in the statement of facts are to the Appendix to the Transcript of Record certified by the Clerk of the Court of Appeals and will be referred to as "R.A. 1", "R.A. 2", etc., citing the specific page number of the Appendix where the statement can be found.

ance of the jail population is made up largely of convicted misdemeanants, serving sentences from 30 days to one year. (*Id.*) The jail also contains persons convicted of felonies and misdemeanors awaiting sentence and other prisoners, both Federal and State, in transit from one facility to another. (*Id.*) There is a vast turnover in prisoners in the jail as opposed to the more permanent nature of such institutions as penitentiaries. (*Id.*) A great proportion of the inmate population in the Wyandotte County Jail is made up of recidivists. (*Id.*)

The layout of the jail is as follows:

Along the north side of the jail there are four separate holding areas, referred to in the evidence as the "northwest tank", the "west tank", and the "east tank", and the "northeast tank". Cell areas of each are as follows:

Northwest tank—4 individual cells, with 2 beds each; capacity 8

West tank—4 cells, 8 beds each; capacity 32

East tank—4 cells, 8 beds each; 1 cell, 4 beds; capacity 36

Northeast tank—4 cells, 8 beds each; capacity 32. (R.A. 300-301)

The tank assignments in the jail are made as follows:

The Warden and his staff make certain objective determinations which depend upon the prisoner's age, the charge against him, and his physical and mental condition. Since many of the prisoners are recidivists, the Warden also draws upon his personal knowledge concerning a prisoner's prior conduct in the Wyandotte County Jail. Based upon such objective criteria, the Warden assigns his worst security risks, those known to be prone to

excessive violence or escape attempts to the "northwest tank" which contains the locked cells, with no "tank area".

Those "next-worst" so to speak; those prisoners who have misbehaved while in the general prison population or who need protection from other prisoners, the "problem prisoners", are assigned to cells in the northeast tank. Those charged with minor offenses and young offenders are assigned cells in the "boys' tank". Those with mental, physical, drug or alcohol problems are assigned to the "drunk" and "sick" tanks. Women prisoners are assigned to the "women's tank". The balance of the prisoners, usually older, and charged with various felonies, such as murder, armed robbery and assault, are confined in the east and west tanks. The assignment to one of the two tanks, east or west, is made on the basis of race. That all cell and tank assignments are made without regard to race with the exception of the east and west tanks. (R.A. 303)

It was the opinion of the jail officials that separation of races in the east and west tanks was necessary for the security and safety of the prisoners and that such separation reduced the fighting as well as other acts of violence. (R.A. 304) Further, when asked whether or not the prisoners wished to be integrated in a survey conducted in 1968 by the jail Warden, the answer from both black and white prisoners in the east and west tanks was unanimously "no". (R.A. 304) In 1968, FBI agents conducted interviews in the jail as to whether they felt they were being discriminated against, to which their answers to both questions were no. (R.A 303-305, 369-421) The evidence further showed that there was frequent fighting in the jail and that some fights were racially inspired. (R.A. 44, 307)

Finally, the evidence showed that the Warden and staff of the jail had at all times endeavored to provide for the security and safety of their prisoners and that the discipline administered by the Warden had been applied in a fair and non-discriminatory manner, that it was not arbitrary or capricious. (R.A. 308-309)

The District Court found that in separating the races in the east and west tanks in the jail, the Sheriff acted in good faith, and with common sense in properly taking into account racial tensions in maintaining the security, discipline and good order of the Wyandotte County Jail. (R.A. 313) That no prisoner was being denied equal protection of the laws and that no prisoner in the Wyandotte County Jail in the time in question had been otherwise subjected to discrimination or deprived of his right to equal protection of the laws on the basis of his race, color, or religion, or national origin by being denied equal utilization of the facilities of the Wyandotte County Jail. (R.A. 314)

REASONS FOR GRANTING THE WRIT

A. Conflict with decisions of this Court.

This case is of utmost importance to the administration of jail facilities by state and local governmental agencies, for if the Court of Appeals' reading of the decision in *Lee* v. *Washington*, 390 U.S. 333 (1970) is allowed to stand, jailers are faced with an intolerable situation. In order to justify segregation of prisoners on a racial basis, jail authorities must wait for violence to occur. Such a mandate is unthinkable when viewed realistically in light of day to day jail environment, and completely departs from the basis of the Court's ruling in *Lee* v. *Washington, supra.*

The Court in *Lee* correctly upheld the Court of Appeals' decision that Alabama statutes requiring segregation of prisoners in prison and jail facilities by race alone were unconstitutional as violation of the 14th Amendment. Such statutes definitely violate the right to equal protection granted by the amendment. The procedure applied in the Wyandotte County Jail, however, is not compelled by statute, but a product of experience of those charged with the safety of inmates and maintenance of order and discipline in the jail facilities. It is a procedure that reflects the desires of a majority of the inmates. It is not a means of depriving one racial group of rights afforded by the Constitution, but rather a means of ensuring the personal safety of inmates.

The learned District Court Judge, upon hearing the evidence, found that no prisoner was being denied equal protection of the laws and that no prisoner in the Wyandotte County Jail at the time in question had been other-

wise subjected to discrimination or deprived of his right to equal protection of the laws on the basis of his race, color, religion, or national origin by being denied equal utilization of the facilities of the Wyandotte County Jail. Indeed, all the trial judge's findings of fact and conclusions of law lead him to dismiss the complaint.

Arguments of logic and reality seem to be losing favor with the Courts in recent times, but in the present situation stark reality must be faced. Racial tensions do exist among the class of persons incarcerated in the Wyandotte County Jail, and a majority of the prisoners are prone to violence. As the record reflects, a poll of the prisoners in the jail shows that they desired separation, and did not feel that they were being discriminated against. It is beyond logic to believe that the Court in *Lee* v. *Washington, supra,* envisioned such a situation in ruling the Alabama Statutes unconstitutional.

B. Conflict with decision of another Court of Appeals.

The 10th Circuit's per curiam opinion cites such cases as *McClelland* v. *Sigler,* 327 F. Supp. 829 (1971), and *Holt* v. *Sarver,* 309 F. Supp. 362 (1970), as standing for the flat proposition that any separation of prisoners on a racial basis is a violation of constitutional rights. It is apparent that neither opinion goes that far.

In explaining the Court's reversal of its refusal to order desegregation of the same prison facilities four years earlier in *Moss* v. *Sigler,* Civ.879L (unpublished memorandum) (1967), District Judge Urboun stated, "First, in the *Moss* case the petitioners who sought segregation expressly withdrew any contention that the accommodations in the East Cell House were more comfortable than other areas where inmates were housed. In the present

case on the other hand, the evidence is convincing that the accommodations in the East Cell House are more desirable than those of the West Cell House." *McClelland* v. *Sigler, supra,* at page 834.

It is apparent from this quotation that the court envisioned at the minimum some showing of discrimination or violation of constitutional rights. In the Wyandotte County Jail situation, the specific finding of the trial judge was that no prisoner was deprived of equal protection nor the subject of discrimination. Absent such a finding, the requisite state action necessary to trigger the 14th Amendment and 42 U.S.C. 2000(a) is lacking.

It must be noted that all the cases relied on by the 10th Circuit to support its reversal are cases dealing with prison facilities. The situation in the Wyandotte County Jail is diametrically opposed to that of a prison. The vast majority of persons incarcerated in the Wyandotte County Jail are transient prisoners awaiting trial or transportation to other prison facilities. Because of this situation, many of the arguments and precedents applicable to a prison are inapplicable to the jail. The county lacks the facilities and the manpower to carefully screen each prisoner and isolate those with violent tendencies. Likewise, the custodians of the jail do not have the advantage of extensive evaluation reports on prisoners. In summary, the Wyandotte County Jail is faced with problems particular to its own situation, and rules pertaining to a prison situation are neither controlling nor applicable.

Respectfully submitted,

NICK A. TOMASIC
District Attorney for the 29th
Judicial District of Kansas
Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM, 1973

No. 72-1633

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WYANDOTTE COUNTY, KANSAS, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(KC-3163)

(Filed June 21, 1973)

JAMES P. TURNER, Washington, D. C., for plaintiff-appellant.

NICK A. TOMASIC, Kansas City, Kansas, for defendant-appellee Attorney General for the 29th Judicial District of Kansas.

ROBERT J. FOSTER, Kansas City, Kansas, for defendant-appellee Board of Commissioners of Wyandotte County.

Before LEWIS, Chief Judge, BARRETT, Circuit Judge, and TALBOT SMITH, Senior District Judge*

*Eastern District of Michigan, sitting by designation.

PER CURIAM

This case concerns the assignment of prisoners on a racial basis to areas of incarceration in the Wyandotte County Jail, Kansas City, Kansas. The action (seeking injunctive relief) was filed by the Attorney General of the United States pursuant to Section 301(a) and (b) of Title III of the Civil Rights Act of 1964 (42 U.S.C. 2000 (b)(a) and (b)). It was the charge of the complaint that the Wyandotte County Jail is a "public facility" within the meaning of the Act[1] and that the defendants maintained racially segregated jail facilities in violation of Title III, the Equal Protection Clause of the Fourteenth Amendment and a written contract[2] containing a no-discrimination clause between the Director of the Federal Bureau of Prisons and Wyandotte County, Kansas.

There is no dispute concerning the essential facts. As the district court found "Assignment to one of the two tanks [an East tank and a West tank] is made upon a racial basis, with Negroes generally being assigned to the

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1. 42 U.S.C. §2000b(a) provides in part that

"Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof . . . and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court . . . against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. . . ."

2. See 18 U.S.C. § 4002.

East tank, and white prisoners being assigned to the West tank."[3] Nevertheless, the district court entered its memorandum opinion and order dismissing the complaint and denying all relief requested by the United States.

We need not labor the point that a State may not constitutionally require segregation of public facilities, Johnson v. Virginia, 373 U.S. 61 (1963), and the principle is as applicable to jails as to other public facilities, Lee v. Washington, 390 U.S. 333 (1968).

The defense to the charges made was that the segregation employed was "not intentional or systematic segregation but was a result of and justified by a desire to protect individuals against personal abuses and violence," reliance being placed upon the statement in the concurring opinion in Lee v. Washington, supra, to the effect that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."

We cannot construe this caveat as authorizing the consistent and settled practice of "Negroes to the East tank, whites West tank," we have before us. The use of

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3. The general plan of "tank" assignments in the jail is based upon a number of criteria. The worst security risks, those persons believed to be prone to excessive violence, or to escape attempts, are confined in what is known as the "northwest tank" having locked cells with no "tank area." Those with somewhat lesser problems, having, for example, been guilty of misbehavior while in the general prison population, those requiring protection from others, and, generally, the "problem prisoners" are assigned to cells in the northeast tank. Minor and young offenders are assigned cells in the "boys' tank," those with illnesses in the "drunk" and "sick" tanks, and women to the "women's tank."

All of the above assignments are made without regard to race.

The balance of the routine prisoners are confined in the East and West tanks on the basis of race, whites in the West tank, Negroes in the East tank.

the words "particularized circumstances" is significant, the quoted clause doing no more than recognizing the commonly accepted principle[4] that in the administration of prison affairs there may arise unusual situations in which security and discipline demand segregation for limited periods.

The record before us, moreover, does not warrant even the limited and isolated segregation recognized as permissible in penal situations of unusual stress. The practice of segregation had had its origins in this jail "a few years back." The present Sheriff and the Undersheriff both had been told that when the races had been placed together at that time, violence had resulted because, it was said, of racial tensions. Consequently, as the Sheriff testified, "It was already segregated when I got there and I just continued to practice on the advice of some of my predecessors and the personnel that worked there."[5] However, the Sheriff personally knew of no specific examples of interracial violence during his tenure, and although racial fights had occurred "once in a while," they occurred no more frequently than for other reasons. A former jailer, Mr. Groves, testified in fact that he knew of no fights engendered by racial animus. Warden Pacheco was of the opinion that they occurred "once in a while." "More frequently," he was asked, "than fights for other reasons?" "No," he replied, "I don't think so." Fighting actually seems to have occurred less frequently among inmates in the integrated areas (here the violent and problem cases) than in the segregated tanks.

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4. *e.g.*, McClelland v. Sigler, 327 F. Supp. 829 (D. Neb. 1971), *aff'd* 456 F.2d 1266 (8th Cir. 1972); Washington v. Lee, 263 F. Supp. 327 (M.D. Alabama 1966), *aff'd* 390 U.S. 333 (1968).

5. App. 29.

There was some attempt at the trial to justify the segregation here imposed on the ground that the inmates of these two tanks were "hardened" criminals with such propensities to violence that segregation was necessary for the "safety of everybody concerned." The actual administration of the institution does not support the claim. The real problem makers are sent to the non-segregated northwest and northeast tanks. The balance, except for such special cases as drunks, juveniles and women, are sent to the segregated tanks, the populations of which range in years from 16, 17 and 18 through the 40's and 50's and in offense from misdemeanor, "joy rider," traffic violator, burglar, armed robber and narcotic offender to convicted murderer.[6] The appellation of "hardened criminal" to such a routine mix would, without more, seem manifestly inappropriate.

What all of the above finally boils down to is a vague fear on the part of the authorities that desegregation may result in violence. This is not enough. The words of the Supreme Court in Watson v. Memphis, 373 U.S. 526 (1963), are peculiarly appropriate to the record before us: "[N]either the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials." 373 U.S. at 536.

But beyond this, the argument that desegregation of public facilities might provoke violence has never been accepted to justify unconstitutional segregation. Over fifty years ago it was held that,

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6. Jail census prepared by the Warden for the Federal Bureau of Investigation, Jan. 28, 1970.

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Buchanan v. Worley, 245 U.S. at 81.

The years following have seen no dilution of the principle here expressed. See, *e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (desegregation of schools); Watson v. Memphis, supra (desegregation of public parks).

Nor has the application of the principle been excluded from the administration of correctional institutions. See, *e.g.*, McClelland v. Sigler, supra; Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968); Rentfrow v. Carter, 296 F. Supp. 301 (N.D. Ga. 1968); Washington v. Lee, supra. Peculiarly appropriate at this point are the words of the district court in McClelland v. Sigler, supra, with respect to a similar problem.

> "Threats of recalcitrant prisoners whose racial prejudices are erected to defy the constitutional rights of black prisoners need to be quashed. The prisoners who threaten violence, rather than those who seek their right to nondiscriminatory treatment, should be the ones to feel the weight of the consequences of their overt bigotry." 327 F. Supp. at 834.

The decision below is reversed and the cause remanded for further proceedings not inconsistent herewith.

APPENDIX B

UNITED STATES COURT OF APPEALS
Tenth Circuit
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Denver, Colorado 80202

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Clerk

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303-837-3157

June 21, 1973

James P. Turner, Jesse H. Queen,
Richard W. Bourne and
John C. Hoyle, Esquires
United States Department of Justice
Washington, D. C. 20530

Re: No. 72-1633, U. S. A. v. Wyandotte County, Kansas, et al.

Gentlemen:

Enclosed is a copy of the opinion of the Court in the above case. Judgment in accordance with that opinion has been entered today.

Sincerely yours,

Howard K. Phillips,
Clerk

By: /s/ Lavon M. Irlbeck,
Deputy Clerk

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Enclosure

cc: Honorable Robert J. Roth, United States Attorney
Federal Building, Kansas City, Kansas

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